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Importance of the Study

of

Argentine and Brazilian Civil Law

OPENING ADDRESS

BY

ENRIQUE GIL

At Kent Hall, Columbia University Law School

First Course on Spanish-American Civil Law—Spring Session

Law Department Extension Teaching

February, 1921

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FINIS.

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FIRST PART.

INTRODUCTION.

The fact that Dean Stone of the Law School of Columbia University has propitiated and favored the establishment of this course is not the result of a fancy notion, or a caprice.

The growing economic expansion of this country into foreign markets, mainly those of the other Republics of America, has brought about a sequel of conflicts of legal character demanding for their settlement the intervention of lawyers versed in the principles of civil and commercial law as practiced in Argentina, Brazil, Chile, etc.

New investments and new business abroad make necessary the study under those laws of the status of contracts, mortgage credits, deeds of trust and debentures; the study of how to overcome the apparent impossibility of establishing mortgages on future property, or on personal property; the study of the institution of heirs at law; the protection of literary and artistic rights, mainly in connection with moving picture business and musical productions. The domestication abroad of American companies or the organization of new corporations to conduct new enterprises, and the desire to limit the liability of the parental company as well, or the danger of cumulative taxation—require that the American practitioner should be acquainted with the Argentine, Brazilian, etc., legislations with regard to stockholder's rights, meetings, director's rights and obligations, taxes, licenses, powers of attorney, problems of agency, mandatum. The peculiarities and differences between these legislations and the American, with reference to the immediate transmission of rights of ownership, legal title and possession of an immovable thing, even if the price has not been paid or paid only in part, the legal status of creditors in bankruptcy proceedings whether they are creditors of dominium (lien) or merely having a chirographic credit, are problems which will have to be solved by you as attorneys with more and more frequency.

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More than once, like Justice HOLT in the celebrated case of *Coggs* vs. *Bernard,* the local practitioner will have to refer to the sources of Civil Law to interpret contracts concluded in Argentina or Brazil or Chile and other countries, be it the construction of the contract of deposit, or of commodatum, or the liabilities of common carriers.

Likewise the value of arbitration awards will be questioned by his American clients when he is consulted as to their possible judicial enforcement in those countries; the construction of the flexible clause of *force majeur,* act of God, etc., will more than once fill with perplexity the local attorney when confronted with contracts concluded abroad.

The meaning of the personal or real statute in connection with matters of marriage, divorce, illegitimacy, enforcement of judgments, will come often to the fore when he will have to solve entangled conflicts of law for which, as Professor Aymar has said, the knowledge of foreign laws and doctrines is absolutely necessary.

The growth and development of the American merchant marine, which is well reflected by new legislation and judicial decision affecting admiralty cases, has as a consequence required the intervention of attorneys in many instances when the knowledge of the law governing these matters in foreign nations became imperative. This has been confirmed to me by a practitioner of this city and Professor of Admiralty law, Mr. Sprague, and also by simply perusing the 1919 volume of Navigation Laws of United States.

Now a matter of daily occurrence is the arrival of rogatory letters to the courts of this city requesting the authorization for commissioners specially appointed, to take testimony, cross examine witnesses, secure copies of records, etc., and the case of *Nelson* vs. *U. S.,* I Peters, U. S. Circuit Court Reports, p. 235, is not an isolated one. In these matters a knowledge of the points and elements to be considered for a faithful compliance with the commission can be better had, if the legal requirements and precepts of the country where the letters rogatory come from are not unknown to the commissioner or referee.

The learned opinion of a distinguished professor of this school, Doctor John Bassett Moore, will confirm to you how

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useful for the better protection of American interests is the knowledge of certain principles of the public law of countries like Argentina, Brazil, Chile, Mexico, etc., when we come to study the responsibility of municipal corporations or of the provinces, in the case of losses, or appearances before courts of claims and the like. I do not have to point out to you how it will facilitate your task in this and other matters, to be acquainted with other people's point of view as it obtains under a different jurisdiction.

This new course is not due to a circumstance arising from the great conflict. If it were I would be doubtful of its merits, reasons and usefulness.

On the contrary, this initiative of Dean Stone finds back of it antecedents and traditions to justify it.

In the New York bar are practitioners of distinction and accomplishment who have for many years past found it necessary to specialize in civil law of Argentina, Brazil, Chile and other countries, in order to render efficient service to a continuously larger clientele. To confirm the above it is sufficient to remember the names of G. W. Wickersham, Severo Mallet Prevost, Winslow B. Pierce, Henry W. Taft, Phanor J. Eder, and Joseph Wheless, whose knowledge of civil law and Spanish language have been of the greatest assistance to their American clients on more than one occasion and a matter of considerable importance.

There are today in New York over a score and a half of law offices where a lawyer trained in civil law and knowing Spanish will be readily accepted either to work in the city or in their branches abroad. It should also be remembered that outside of the legal profession there are several banking institutions and commercial houses, among the most powerful in the country, with branches abroad, where men so qualified will be accepted, receiving better compensation than a mere lawyer working in any of their legal departments as a clerk.

This course of lectures will not be academic but practical. I will be guided in the preparation of its plan by seven years of experience as a practitioner in this line of work, called to collaborate in ninety cases out of one hundred with members of the local bar.

I will not be a professor, instructor or teacher to the class; I will be a student among students with perhaps a

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little more knowledge gained from experience on the subjects to be treated.

The time assigned for the lectures will be divided into two periods. During the first period I shall expound the doctrine which obtains in each case.

Realizing how difficult it will be for the student to profit alone by oral exposition of subjects somewhat new to him and for which there is no text book to follow, I will give at each lecture to the members of the class a mimeograph synopsis of the points to be reviewed in the next lecture.

During the second part of the lecture we will hold a seminary class to discuss some of the points brought out in the lecture, or in the papers which the students will prepare from time to time.

Of course the work will have to be done with enthusiasm. It may appear in the beginning dry and arid, but even the superb dissertations of Maine on Ancient Law, or Von Ihering on Roman Law, those priceless masterpieces, are uninteresting to the student with a vision limited to secure enough credit to entitle him to a diploma.

Please allow me to explain at this juncture that, although the title of this course has been announced under the caption of Spanish American Civil Law, the work which is to be done is to be limited almost exclusively to analysis of the Civil legislation of Argentina and Brazil, with only occasional references to the legislation of the other countries.

There are two good reasons for this change in the scope of our work. First, our time is very limited, and while we may derive great profit from the study of civil legislation of many of the American nations formerly under the Spanish rule, the diversity of this legislation in number, although not so much in kind, would consume considerable time in a tedious comparative study. Thus having in mind the common ancestry of said legislation, we have taken the Argentine Civil Code as one of our subjects for study, it being recognized as a progressive, advanced code.

Second, the announcement of a Course in Spanish American Civil Law would have naturally barred the study of the Civil Law of Brazil, whose civil code is in more than one respect far superior to those of the other American countries.

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In spite of the above announced limitations, we will be unable to cover the whole ground during the time at our disposal, as you will notice by the schedule of the program of study, which covers only some of the most important points.

In the First Lecture we will review the importance of the study of Argentine and Brazilian Civil Laws for the New York practitioner; followed by a discussion on codification, its value from a social, political and constitutional point of view. The scope of civil law in Argentina and Brazil, the family and property as its most important institutions, and a few recommendations with reference to the course, will be covered in the First Lecture.

The Second Lecture will be on the Laws of Persons and Capacity.

The Third Lecture will treat the rights of family, Marriage, Divorce, Civil Registry, Validity of Marriages and Divorces, contracted or granted, respectively, out of the jurisdiction.

The Fourth Lecture will cover Domicile and its Different Legal Aspects.

The Fifth Lecture will be on Rights of Nationals and Foreigners, Citizenship problems, *jus soli—jus sanguinis;* Foreign Laws and Judgments, their application and enforcement.

In the Sixth Lecture the Law of Property, Possession, Inviolability of Property—Expropriation—Literary, Scientific and Artistic Property, Trade Marks and Patents, will be reviewed.

The Seventh Lecture will be on Mortgages: (1) General Rules and Definitions; (2) Legal Mortgages; (3) Registrations; (4) Modes of Extinction; (5) Mortgages of Railroads; (6) Argentine Law of Debentures.

The Eighth Lecture will cover Juristic Persons—Corporations, National and Foreign—Analysis of Dr. Moreno's Study *re* Legal Doctrines on Corporations.

The Ninth Lecture will treat the subject of how can an American Corporation do business in Argentina, Brazil, Chile, etc. Taxation, Railways, Banks, Navigation Companies. Principle of Reciprocity. Argentine Law No. 8867. Civil and Commercial Laws on this subject.

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The Tenth Lecture will be on Liability of Corporations, Criminal and Civil. Agents, Representatives, etc.

In the Eleventh Lecture we shall review the Notarial Organization. Private and Public Documents. Deeds. Powers of Attorney. Documents called *Habilitantes*. Legalization. Evidence. Witnesses, Letters Rogatory.

The Twelfth Lecture will be on the Law of Obligations. *Its Theory—Ex Contractu—Ex Delicto.* Liberty and Freedom to contract. Limitations.

The Thirteenth Lecture will treat of The Effects of Contracts. Law ruling same in case of conflict of laws. *Locus Regit actum. Lex rei sitae. Lex Loci Contractus.*

The Fourteenth Lecture will be on the Law of Inheritance. Heirs at law, Rights of surviving spouse, Dowry Rights.

The Fifteenth Lecture will cover Wills, modes of execution. Probate.

Although it may appear to you that the program of work just enumerated, a full synopsis of which is given apart, is very comprehensive, I should like to point out that it does not cover the subject in full. Important institutions, as for instance, that which governs the acquisition and loss of real and personal rights by the lapse of time, namely, the statutes of limitation; that of privileged credits, and that of real rights of pledge and antichresis, likewise a number of easements, otherwise known as servitudes, etc., are not to be studied during these lectures.

SECOND PART.

First Lecture.

Importance of the Study of the Argentine and Brazilian Civil Law.

In the preceding part of this address we have briefly announced in a general way that the importance of this study can be analyzed under three headings:

First. As an antecedent in favor of Codification.

Second. As a useful adjunct to the study and practice of common law.

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Third. As an indispensable auxiliary for those Americans interested to create a better understanding between United States and the other American nations, taking into consideration the economic future of this relationship.

First Chapter.

I. *As an antecedent in favor of Codification.*

Charles F. Beach says (*op. cit.*): "We shall be compelled in no very long time by the sheer necessities of our case, to abandon common law theory and practice and to come squarely to the Franco-Roman Law scheme of Codification, thus getting in line in our law and in our procedure as we ought to have done hundreds of years ago, with the rest of the modern world as well as with the wisdom of the ancients."

This is not a new movement in the United States or in England. In 1873, by the Judicature Act, the Common Law Courts and the Courts of Chancery were united, giving full pre-eminence to the rules of equity over those of the Common Law. David Dudley Field, the well-known American Jurist, before that date preached in favor of a similar reform. The Code of Civil Procedure of New York, 1848, is the earliest American example of this new tendency towards Codification.

Lord Bacon, Jeremy Bentham, John Austin, Thomas B. Macaulay were for many years the advocates of this reform in England, and found many adepts and followers in the United States as well as in their own country.

Sherman (*op. cit.*) protests "against the miserable confusion of forty-eight different varieties of State Common Law, on which is superimposed that other variety known as 'Federal Common Law,'" all of which, except in Louisiana and California, is largely but unwritten law distributed in over 10,000 volumes of American and 6,000 volumes of English Law Reports.

Rome, France and Germany, at the end of the last century, among other nations, faced a similar problem whose solution was found in establishing one code of substantive law for the entire country.

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Of course, this experiment has met with strong opposition. It is contended that a federal code is impossible without abrogating the autonomy of the various states; it is also said that such a codification will produce a stagnation in the growth and development of the law; that only monarchies or empires can codify their laws; and, finally, that English-American Laws are not codifiable.

The first objection can be easily refuted, by citing only the fact that at present there is in this country a federal statute on bankruptcy and admiralty, and pointing to the fact that unification of laws means a greater nationalization of the country. The argument of the stagnation of the law has been answered by the enactment of flexible codes with powers of revision and amplification, which was not unknown in Rome under the system of the Novels nor in the magnificent German code of 1900. The Argentine Civil Code, for instance, has been revised from time to time, not only by Congress, but in a certain measure by the jurisprudence established by the courts. The objection that codification is a work reserved to monarchies or empires can also be proven fallacious by the instance of Argentina and Brazil. The last-named country occupies an area greater than that of the United States.

Finally, it is said that Anglo-American law is not susceptible of codification, a statement which is contradicted by the mere fact of the existence of the well-known Anglo-Indian codes of Criminal and Civil Law.

First Section.

The Argentine Civil Code—Its History—Scope.

But it is not my purpose to plead in favor of codification of American Law, but to show how codification of Civil Law has been accomplished in Argentina and Brazil, and let you deduct the conclusions which you deem best.

The 24th of August, 1852, a decree was issued by Don Justo José de Urquiza, Provisional Director of the Argentine Confederation, and attested by his Minister, Dr. Luis J. de la Peña, providing for a commission of fifteen members

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to draft four codes: the Civil, Commercial, Penal and of Procedure. The preamble of the decree, as translated by Mr. Phanor J. Eder, said, among other things: "The legislation now in force contains laws passed during a period of time extending over many centuries, and known to the people on whom they are binding, stored away in court archives or in the private libraries of a few individuals fortunate enough to possess them as priceless curiosities; society at large, and very often jurisconsults and the judges themselves, are ignorant of their very existence, and consequently the sudden and unexpected application of these laws is as inappropriate as it would be to adjudge matters by provisions which have not been duly promulgated."

Dr. Lorenzo Torres was appointed under the decree of Urquiza as chairman of a committee to draft the Civil Code, but Dr. Torres resigned, and in his place was appointed by a decree of the 3rd of September of the same year Dr. Dalmacio Velez Sarsfield. Due to political disturbances, Dr. Velez Sarsfield began his work only in 1864, when he was confirmed in his old commission by a decree of President Mitre and his Minister, Dr. Eduardo Costa, in pursuance of an act of Congress passed the 9th of June, 1863.

At that time (says Dr. Colmo, *op. cit.*) there was no one better trained than Dr. Velez to undertake such a work. He was a jurist; he had written and published more than one work, he was a practitioner of high repute, and was well versed in economics, having taught the subject at the University of Buenos Aires, and founded the bank of the Province of Buenos Aires; he was a Congressman and Minister several times, had a share in the drafting of the Code of Commerce of that Province. "It was an appointment which is difficult to criticize. His designation for this task was a wise one, because Dr. Velez could not be substituted."

The Code was submitted to Congress on August 25th, 1869, and was enacted into law without discussion on September 29, 1869; the first official edition was printed in New York in 1870.

The fact that Dr. Velez's work was approved without discussion by Congress has been the subject of much criticism

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on the part of those who think such a measure undemocratic and who believe a Congress unfit to undertake the revision of works which are so technical in their very essence. As a rule it is admitted, as Dr. Colmo states, that such a course is not without precedents, and that in the elaboration and enactment of other codes its wisdom has been demonstrated. The Code was amended twice since January 1st, 1871, when it went into effect. The first time, in 1882, certain typographical errors were corrected, and in 1889, the chapter relating to marriage was abrogated, and was substituted by the Law of Civil Marriage of November 2, 1888, which was also amended by the Law of November 12, 1889.

From a political point of view the enactment of this Code has had a great importance in Argentina, and in its over fifty years of existence it has contributed considerably to the work of Argentinization of the country, a task whose importance cannot be overrated when we take into consideration the cosmopolitan composition of its population. (See Colmo, *op. cit.*, p. 83.)

In this way the Code has fulfilled a mission which was contemplated when the Argentine Constitution of 1853 went into effect. By Section 67, subdivision 11, of the Constitution, it was provided that Congress had the duty to enact Civil, Commercial, Penal and Mining Codes, such codes, however, to be enforced by the local courts, federal or provincial, according to their respective jurisdiction.

Here it is opportune to remark that this Section of the Constitution draws a very sharp difference between substantive and adjective legislation; the latter, namely, the Law of Procedure, be it Commercial, Civil or Criminal, was left to be enacted entirely by the Provinces or States, of which Argentina has fourteen.

It may be safely stated that the Civil Law as embodied in the Code, is different from the Commercial Law which has jurisdiction only over certain classes of persons, traders, or over certain special business and commercial affairs. Civil Law concerns only the two leading social institutions—the family and property.

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But we should not be misled, by the pre-eminence given by Section 67, Subdivision 11, of the Constitution, to the Codes to be enacted by the Congress, into believing that concerning matters of Civil Law the Code is a superior Law to all. As a matter of fact, the order of precedence is established by Section 31 of the Constitution, which says:

"This Constitution, the Laws of the Nation which shall be enacted by Congress in pursuance thereof, and treaties with foreign powers, shall be the supreme Law of the land, and the authorities in every Province shall be bound to conform thereto, anything in the Provincial Constitution or Laws to the contrary notwithstanding."

This provision is of real importance when we find that general principles of Civil Law, such as "the inhabitants of the Nation enjoy the rights of using and disposing of their property freely; to associate for useful purposes"; "contracts for the purchase and sale of persons are criminal acts for which the contracting parties, as well as the Notary or official before whom are executed, shall be held liable"; "every author and inventor is the exclusive owner of his work, invention, or discovery"; are principles to be found in the Constitution itself.

Yet the Code does not outrank provisions made by international treaties, as besides Section 31 of the Constitution, with reference to the value of Treaties, Section 13 of the Civil Code itself provides "that foreign Laws may be made binding in the Republic by diplomatic conventions or by special law."

While the Code of Napoleon has served as a model in the case of Argentina as in that of almost every other nation of South America, the work of Dr. Velez Sarsfield divides the subject into four books, following the arrangement suggested by Freitas in his Project of Code for Brazil. The Code Napoleon divides the subject into three books, Persons, Things and Modes of Acquiring Property, while the Argentine Code, in its first book, treats of persons in general, personal rights and family relations; in the second book, of personal rights and Civil relations; in the third book, of real rights; and in the fourth book, of Successions. The

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Chilean Code, drafted by Dr. Bello, and the Colombian and Equadorian, are also divided in four books, but treating different subjects.

Very often the Common Law Practitioner fails to visualize the true value of a Code, and considers it a conglomeration of Laws arranged by subject without connection among them. That which may be the case with Common Law Statutes and Reports, as they are annotated and presented today under the shape of a digest, does not happen in a good Code, which is in its very essence an organized body. The interdependence and correlations between the different parts of a Code are such that it is necessary for the student to become acquainted, first, with the plan guiding the Codifier in order that he should be able to use the Code to best advantage. In this connection the logical order followed by Dr. Velez Sarsfield in the division of the subjects, although not entirely original, should be carefully analyzed. Dr. Sarsfield follows the person from the time of birth through life, within the family and as a family maker; studies the element of capacity and takes up the relations between persons and persons and property, ending by analyzing the legal effects of the person's death.

What Was the Local Legislation in Argentina Previous to the Enactment of the Code.

Nothing could give a better idea of the legislative chaos which was solved and clarified by the enactment of the Argentine Code than an enumeration of a few of the statutes which were passed in the different Provinces, since the country became free of the Spanish rule. This reference will not include the Spanish legislation which prevailed at the time of and during the Colonial days, as that will be reviewed very shortly when endeavoring to demonstrate how Anglo-Saxon American Law and Latin-European American Law are only branches of Modern Roman Law.

For this enumeration of Pre-Code Argentine legislation we are indebted to Dr. Colmo, whose book on *Técnica Legislativa* has already been mentioned, and is a most thorough and painstaking work.

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Provincial Laws.

Mendoza,	October 1st, 1857,	On rate of interest.
	October 16, 1860,	On Property and Public Lands.
	May 13, 1861,	Decree on Lost Property.
San Luis,	October 20, 1860,	On Guardianship and Bonds.
Santa Fé	22, VIII, 1855,	*re* Code of Commerce and Ordenanzas de Bilboa.
	27, VI, 1862,	*re* Successions.
	30, VII, 1862,	Creation of a Registry for Deeds.
	17, II, 1864,	*re* Notaries and Registration of Deeds.
	29, IX, 1867,	*re* Civil Marriage.
	3, VII, 1868,	Derogation of Law on Civil Marriage.
	18, XI, 1868,	Registration of Deeds of Purchase and Sale.
Entre Rios,	9, XII, 1824,	*re* Transfer of Real Property.
	28, July 1826,	*re* Owners' Rights.
	19, August 1830,	*re* Owners' Rights.
	6, February 1850,	Validity of Deed Executed Out of the Jurisdiction,

and eight more laws cited for this Province by Dr. Colmo, who also describes ten laws of the Province of Jujui, eight of the Province of Córdoba, over eleven in the Provinces of La Rioja, Tucuman, Buenos Aires, etc. Dr. Colmo's list is by no means exhaustive, as he himself says. Besides this legislation enacted by the States, there was a very prolific federal legislation which contributed in no small measure to increase the prevailing confusion of Spanish, Colonial, State and Federal statutes, all of them having more or less judicial imperium.

In the case of Argentina the task of Dr. Velez Sarsfield in preparing the Code was far more difficult than it would be even in this country or than it was in Rome.

Dr. Plaza, in his address at the University of Córdoba on the occasion of the 50th anniversary of the enactment of the Code, said that Dr. Velez Sarsfield had to prepare an entirely new body of laws for a new nation, without antecedents or good foundations for his work.

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"We are facing the necessity," wrote Dr. Velez Sarsfield to the Government, on the 21st June, 1865, "of developing our Law by legislation, as we have not the advantages the Romans had of possessing an original legislation, born with the Nation and which grew as the Nation grew. While the Romans compiled *their own* laws, ours came from mediaeval times and were enacted by authorities which had nothing in common with the people of these colonies."

SECOND SECTION.

The Brazilian Code—Its History—Scope.

When Brazil undertook for the fifth time to adopt a code, a serious discussion arose as to the advisability of codifying the Civil Laws of the country.

A champion of the adverse doctrine was Inglez de Souza, cited by Clovis Bevilaqua, whose erudite work, *Em Defeza do Projecto de Codigo Civil Brazileiro*, we shall briefly review. De Souza's brilliant criticism called forth a not less brilliant answer from Bevilaqua.

It is said that right dwells not only in the Law, but more often in the customs that inject blood and life into the inanimate mechanism of the Law, and that adjusting the principles of Justice to the inflexible rules of a Code, means to retard and annihilate its natural development.

But it must be remembered that Codes are not flexible or rigid—but semi-flexible—in which the people find a protection against the ill-advised and arbitrary will of those administering justice.

Codes are never meant to be like monoliths, chiselled in a rock; Justinian himself never pretended that his work was eternal or perpetual.

Savigny, in his criticism, said that Codes only appear in the history of the people when the Nation is weak or in a process of decadence; but he forgets that Codes also are enacted by Nations wishing to strengthen their spirit and nationality or sovereignty, as in the case of Germany, Italy, Switzerland, or the Latin-American countries.

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The force of the laws depends nowadays, as Odilon Barrot, quoted by Belvilaqua (*op. cit.*) says, in that every one of us feels that the existence of society itself depends upon our subjection to the imperium of right and justice. Hence the necessity of simplifying and facilitating the knowledge of legal rights, which ought to be spread among the greatest number so that they might direct each person's conduct.

Previous to the project of Code presented by Teixeira de Freitas, there were two drafts prepared by Cardozo da Costa and Visconde de Seabra, but these two works did not contribute to the elaboration of the subsequent projects.

On January 11, 1859, the Imperial Government of Brazil entrusted to Freitas the preparation of a Code in pursuance of a decree of December 22, 1858. Freitas, who had been working by request of the Government since 1855, on the task of consolidating the Civil Laws of the country, prepared an unfinished juridical masterpiece comprising four thousand nine hundred and eight articles.

But the "Sketch" of Freitas was not completed. The third book, on the Law of Real and Personal Rights, was never written. Unfortunately, the responsibilities of his task and excessive work so affected Freitas that his biography is today, as Bevilaqua says, "the most painful page in the intellectual history of Brazilian jurisprudence."

The second attempt was due to Nabuco de Araujo, who was entrusted with this work in 1872, but he died a short time afterwards, leaving a few fragmentary notes.

In 1881 Felicio dos Santos presented a project of Code to the Government. Dos Santos divided the subject into three books, namely: I. Law of Persons. II. Law of Things. III. Of Juristic Acts. This project, after many vicissitudes and acrimonious debates and criticisms, was finally pigeonholed.

In 1889 the special commission appointed to draft a project of Code was dissolved with the advent of the Republic, whose provisional Government appointed Dr. Coelho Rodriguez, in July, 1890, to prepare a Code. Dr. Rodriguez finished his task in 1893, and presented a project inspired by German doctrine, which is specially noticeable in the

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division of the subjects. This project was also rejected by the Government.

In January, 1899, Clovis Bevilaqua was commissioned to prepare a draft of Code, which he did by November of the same year. In November, 1900, the project was approved by a Committee of distinguished jurists, and forwarded to Congress by the President. The project was the subject of most scrutinizing and searching criticism and debate, and finally, sixteen years afterwards, was enacted into Law on January 1st, 1916, to go into effect January 1st, 1917. The Corrections ordered by Law No. 3725, of January, 1919, were promulgated July 13, 1919.

Bevilaqua Commentaries on Codification.

In the drafting of this Code Bevilaqua tried to follow Bluntschli's advice to seek the happy medium between conservative and progressive tendencies, which are the two forces on which rests and upon which depends the solidity of the social structure. His purpose was to harmonize the divergent elements acting within a community, accommodating the Law to the newly created customs and assuming discreetly the role of mentor of the nation which has to be guided towards advanced practices as prevailing elsewhere. Bevilaqua gives in brief his opinion of the Code, saying: "It will not be an advanced Code, nor a mere consolidation of the prevailing national Law."

The Brazilian jurist devotes much time and thought to the problem of unifying private Laws, in other words, of concentrating into one body of legislation the Commercial and Civil Law. Of course, in principle, the idea has his full approval, but he does not attempt to carry the same into practice, because he feels that the moment has not arrived for such a merger, and also does not forget how reluctant was the Brazilian Congress to consider such initiative when presented by Councillor Nabuco.

Having adopted the doctrine of the division into separate branches of the Civil and Commercial Law, he cites Roul de la Grasserie's brilliant synthesis of this problem: "The law of merchants does not govern, like the Civil Law, *acquired wealth* or *wealth to be preserved*, but it governs *wealth*

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which is in the making. It might be said that the elements forming the *substratum* of the Law of Merchants are in *dynamic state,* while those elements of the *substratum* of Civil Law are in *static state.*"

The case of the Federal Code of Obligations of Switzerland is not so important in this connection as it may appear at first, because its scope is limited to that part of the private law of an abstract nature in which the evolution of the doctrine is completed, and has been grounded on the firm basis of Roman Law.

But even if we should give greater importance to the Swiss Code, we must soon remember the instance of Germany, where the plan of the single Code of Private Law has not met with favor, and where besides the new Civil Code appears a new revised edition of a remodeled Commercial Code.

Another question to which Bevilaqua has given considerable attention is that of the relationship between the individual and the State. Of course, he could not undertake to study it from the point of view of public law, but in regulating a person's rights, he manages to place within the Code all those principles which may protect individual rights when they adapt themselves to the social purposes of the State.

Of course, his very extreme care and eclecticism brought upon him the bitterest attacks of the leaders of the opposite schools. Bevilaqua calls attention to the fact that some "drops of socialism percolated into the German Civil Code," but he feels that a successful codification cannot pledge support to any given school of thought, with entire disregard to the others.

The work of codification should always be a task of depuration, concentration, classification, methodization, and not of adventurous excursions over roads which are not well known. With regard to the legal principles which had become old and obsolete, the codifier's task is one of elimination. With regard to new thoughts and principles, the codifier ought to accept those already well defined and which have shown support or strength, avoiding to stimulate by legislation, doctrines which are not yet mature, lest great damage may result by it.

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Between an "individualism" with extreme egoistic and disorganizing theories, and a "socialism" all-absorbing and destructive of individual initiative and stimulus, the codifier has to find the average thought or doctrine which will steer the social vessel clear of the danger which always lies in the extremes of all theories. Of course, we do not believe that what Bevilaqua has in mind is that a Law ought to represent the spirit of the *"asno doméstico,"* namely, the middle class of human beings, who, according to the classification of a very well-known Italian crimino-sociologist, is the only one who lives within the law and for whose protection and benefit the laws are enacted, since a superior type (by intelligence, education, inheritance, etc.) and the inferior type (the criminal class) are always above or below the Law, but never within the Law.

By a careful analysis of Bevilaqua's contributions, we may safely assume that his idea is not of a limitative or restrictive Law, but, on the contrary, that legal principles ought to be elastic enough to allow play within the Law for those of the upper type who heretofore have almost always been outside its realm.

When he reached the point of defining the scope of Civil Law, he found himself in the same difficulty as Endemann. First, he had to draw the line between Private and Public Law, then between Civil and Commercial Law, and, finally, between that which belongs to Institutional Law (substantive Law) and law of procedure (adjective law).

Of course, there is nothing novel about this quandary—it has been the eternal philosophical perplexity between objective and subjective.

The difficulty is solved by Bevilaqua, more or less as Councillor Nabuco solved it in Article 23 of his Project, or as the Code of Commerce of Argentina solved it: "Civil Law is that governed by the Civil Code," "Commercial Acts are those governed by the Code of Commerce." In other words, those matters legislated in each of the Codes are to be considered of its realm. Of course, this is natural. Law is one, and the divisions and classifications are merely points of view and made for the better organization of the subject. Thus it is easy to understand that not all Codes rule analogous matters. Take, for instance, proofs and actions. Some

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legislations consider them a matter of procedure; on the other hand, the Italian, Spanish, Argentine, Portuguese and Uruguayan Codes, cited with applause by Bevilaqua, have special provisions indicating its juristic value and the conditions under which proofs are admissible. Here, in this connection, we run into one of the most important problems of delimitation of the scope of substantive and adjective Laws. It refers to the autonomy of the Provinces or of the States, which, as a rule, have reserved the right of enacting legislation on procedure in face of the growing and absorbing Federal or Central Power.

Bevilaqua says that it is not licit to withdraw from the States their jurisdiction over law of procedure, but if the power to enact Civil and Commercial legislation rest only in the Republic, it is evident that it belongs to the Federal legislature to give to the different institutions of Civil and Commercial Law, the organization and extension which it deems best, without sacrificing for the sake of logic, the integrity of institutions, when a separation of substantive and adjective matters might bring unfortunate results.

Finally, the matter of the classification of the subjects to be contained in the Code, receives careful consideration from Bevilaqua, since he recognizes the importance of a systematic exposition of the legal precept through which the Code gains in efficiency and power.

The new Brazilian Code does not follow the system of classification of the Code of Napoleon nor that of the German Code. The Code has four books; first, on the Rights of Family; second, on the Rights of Things; third, on the Law of Obligations; fourth, on the Rights of Succession.

THIRD SECTION.

The Civil Codes of France and Germany.

It is fitting to say here a few words about these Codes because in the minds of many, the Argentine, Brazilian and Chilean Codes, and the Codes of the other Republics, have no other antecedent than the French Code. Likewise it will be of interest for Americans who take pride in

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thinking of the assumed exclusive Saxon ancestry of their legal institutions, to know how Germany elaborated and produced what is generally admitted to be an excellent codification.

The Civil Code of France—Its History—Scope.

There are three well demarked periods in the history of French Law: First, the Ancient Law Cycle, which extends up to the declaration of the General Assembly on the 17th of June, 1789; the Intermediary Cycle from that date up to the enactment of the Code on the 21st of March, 1804; and the third period which begins then and extends up to this day.

The ancient French Law was strongly influenced by Roman Law, principally in the South of France. The Roman Law which was in force in the beginning was that of the classical jurists and the Theodosian Code. The Justinian legislation was imported in the twelfth and thirteenth centuries. In the evolution of the Law we find that the Law of Usages (Consuetudines) evolved in the operation of the Roman rules, gained little by little in importance. Their compilation was begun under Charles VIII; Canonical Law, the Royal Ordinances and the juridical doctrines as expounded by Demoulin, Pothier, Domat, etc., had also a great influence upon the subsequent development of the law of the period.

The idea of codification dates of long ago in French legal history. Brisson prepared what is known as the Code of King Henry III, which was never promulgated; and under Louis XIV different steps were taken toward that end, but nothing concrete was accomplished.

During the intermediary cycle just mentioned, 1789-1804, all the attempts in that direction were fruitless. In 1800 Napoleon, using his full powers as Consul, appointed a committee under the Presidency of Trouchet, and in four months the Code was ready. After many vicissitudes this project was accepted and promulgated on March 21, 1804, as the "Civil Code of France," which in 1807, was named

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the Code Napoleon, to be again differently re-named in the following years.

The Code, in the opinion of Dr. Rodolfo Moreno (h) (*Op. cit.* in Bibliography), "is characterized by its spirit of moderation, the adoption of ancient precepts, and the non-admission, except in a just measure, of the exaggerations into which often the Revolution fell."

The Civil Code of Germany—Its History—Scope.

Savigny opposed for a long time the codification of the Civil Laws of Germany, sustaining the thesis contrary to Thibaut, whose preachings triumphed more than one hundred years afterwards.

Before the codification, the Law governing Central Germany and the territory between the Black Forest and Bohemia and the Wesser and Elbe, was of Roman origin intermixed with local usages. The same condition prevailed in Schleswig-Holstein and Mecklenburg, and in parts of the West of Germany, where Roman Law, and even the Code Napoleon, and the Austrian Code, were in force. There was also a considerable number of additional different laws and codes adopted by cities and countries, which contributed to a most anarchical legal situation in Germany.

Once there was established the legislative unity of the Empire after 1870, by Law of December 30, 1873, it was enacted that a Civil Code should be prepared. In 1874 a committee of eleven jurists was appointed to perform this work. In this committee was included a prominent Romanist, Professor Windscheid, and it had representatives from regions where different laws were in force. After thirteen years of labor, in 1887, the draft was completed and presented to the Government, who had it printed and distributed in Germany and abroad in order to invite criticism. In 1890 a committee of twenty-one members, jurists, economists and trade experts, was appointed to revise the submitted draft, which, after undergoing a thorough examination in the hands of a new committee of twenty-one members, was approved July 1st, 1896, to go into effect January 1st, 1900.

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Sherman, Vol. I, Page 326 (*op. cit.*) says that "The German Civil Code is a very late nineteenth century republication of Roman Law as adopted by Germany. It also embodies many rules of Germanic customary Law especially as to lands rights. But without the Roman *Corpus Juris*, as a key to unlock it, this modern law of Germany cannot be understood. In the German Code of 1900, the Roman Law element is predominatingly supreme."

Conclusions.

Even as brief and incomplete as has necessarily been the preceding review, we feel that it contains enough antecedents to justify the study of the history, of the development, of the Civil Laws of Argentina and Brazil, on the basis of our first claim, namely; that they are valuable references in favor of codification from a social, legal and political point of view, which may be useful when contemplating the undertaking of a similar work in this country.

Second Chapter.

II. *As a Useful Adjunct to the Study and Practice of Common Law.*

Universality of Legal Principles—Ancient Roman Law—The Common Origin of Modern Law.

We believe that while you can derive great benefit from the study of ancient Roman Law, in connection with the practice of your profession as Common Law Lawyers, that benefit will still be greater from the studying of Modern Roman Law as it appears today in the Civil Laws of Argentina and Brazil.

In our opinion, Anglo-Saxon American Law and Latin European American Law are only branches of Modern Roman Law, with its common origin in the ancient legislation that Justinian compiled.

This table, although incomplete, attempts to give a synopsis of the evolution and influence of Roman Law upon what is called Modern Roman Law.

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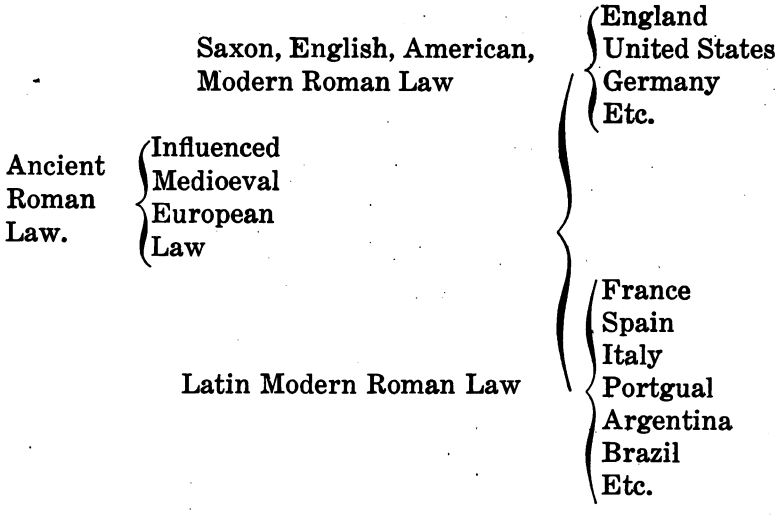

In order to demonstrate this premise we will briefly consider, first, the legislative foundations and legal antecedents of the Civil Codes of Argentina and Brazil; the analysis of those antecedents will take us to their source—ancient Roman Law; second, we shall review the foundations of American Common Law, and we do not think that it will be a difficult task to find also through its English parentage its Roman extraction. In this manner we will confirm the truth of Cicero's conception (as cited by Sherman (*op. cit.*), of the universality of legal principles "which is both scientific and modern."

First Section.

Argentina and Brazil—Antecedents of their Laws.

Spanish, Portuguese and Colonial Laws—Their Roman Origin.

The Federal Constitution of the Argentine Republic was adopted on May 1st, 1853, and under it fourteen different provinces of the ancient viceroyship of the River Plate, plus several extensive territories, with a total area

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about seven times that of Germany, became finally consolidated as the Argentine Nation. The Constitution which was framed, having largely as a model that of the United States, reserved for the Federal Congress and Government, exclusive jurisdiction to enact Civil, Commercial and other substantive Laws throughout the country. The Provinces retained jurisdiction over the enactment of Codes of Procedure, as we have before explained. There is also a judicial system with autonomous branches, Federal and Provincial, which bears a close resemblance to that of the United States.

The antecedents of the Argentine legislation on this subject are identical with those of the other ex-Spanish colonies in America. They were governed by the laws of the Indies, 1680, and the general body of Castilian Laws.

Of these numerous Spanish Laws the following ancient Codes or Laws were in force: The Nueva Recopilación (1567); Leyes de Toro (1505); The Royal Ordinances, Fuero Viejo de Castilla (1356); the Ordenamiento de Alcalá (1386); the Fuero Real (1255); the Siete Partidas (1263); and many others, laws, decrees, ordinances, etc., that were consolidated into a body of laws known as the "Novísima Recopilación" (1805).

Most of these laws were greatly influenced by Roman legislation and tradition.

In 210 B. C. the successors of the Carthaginians and the complaints of the Greek colonizers in Spain brought the Romans to that country, and their domination lasted to 414 A. D.

Roman civilization, art, laws and spirit, left numberless traits in the peninsular as witnesses of its grandeur. Roman history of the period is also filled with the doings of some of its sons of Spanish birth, or ancestry, Trajan, and Hadrian, Antoninus and Marcus Aurelius. Seneca, Lucan, Martial, Quintilian, Pomponius Mela, Florus, the Plinys, etc., contributed with their intellectual power to the brilliancy of Rome.

The history, principally in connection with Spain, of the growth and development of the Roman Empire from its very inception, in its municipalities, to the creation of a super-state, and the failure of this centralization and

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unity, is an example which even today offers material for thought to the studious, mainly at the time when, upon the eve of the fall of centralized despotic government, the towns and the provinces refused to collaborate in the maintenance of the State, giving place to the resurrection of the municipal spirit everywhere. It was in the Spanish *municipios* and *cabildos*, where the democratic ideals of the world found a safe harbor; and to the Peninsular belongs also the honor of developing the system of a Parliament which today is the proudest achievement of the Anglo-Saxon world.

The most important laws of the ancient Spanish legislation, besides the special *Leyes de Indias*, which had a greater application in America (Brazil included), are the *Siete Partidas*.

In 1263 the renowned work of the *Partidas* was published by the Justinian of Spanish jurisprudence, Alfonso X, the Wise. This body of laws represents a revival of the Roman legal legislation, the precepts of which were sometimes literally copied, and reunited as a Code contributed to stop the spirit of localism and feudal disorganization in the customs of the country.

The Siete Partidas is divided into seven books with one hundred and eighty-two titles and 2,479 laws.

The first Partida treats of the natural law, and of usages and customs, also of the Catholic religion, doctrines and canonical Laws.

The second Partida refers specially to public law, the crown's rights and duties; the King and his family; of the duties of the people towards the crown, public education, etc.

The third Partida gives rules of administrative law and organization of judiciary, procedure, and contains also laws on ownership, statute of limitations, possession and easements, almost all of which were taken from Roman antecedents.

The fourth Partida specializes in civil law, family relations, etc.

The fifth Partida is a copy of the Roman Law on Obligations, contracts, loans, bailments, commodatum, partnerships, mortgages and pledges.

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The sixth Partida treats of testaments, codicils, heirs, successions, executors, minors and guardianship.

The seventh Partida has rules of penal law, and a dictionary of words and terms.

The following is a table of the most important laws or Codes enacted in Spain, and which, influenced in a greater or lesser degree by Roman law, had application in Spanish America:

Fuero Juzgo, 687 700; Fuero Viejo, 1212; Fuero Real, 1255; Especulo, 1258; Siete Partidas, 1263; Leyes de Estilo, 1300; Ordenamiento de Alcalá, 1348; Ordenamiento Real, 1490; Leyes de Toro, 1502; Nueva Recopilación, 1567; Recopilación de Indias, 1680; Autos Acordados, 1745; Novísima Recopilación, 1805.

In 1822 Brazil was proclaimed as an independent Empire, and a constitution was adopted in March, 1824. After the Revolution of 1889, the republican form of government was established, and a constitution modeled upon that of the United States was promulgated on February 24, 1891. The Federal Government has by this Constitution the power to enact Civil and Commercial legislation, and the States have jurisdiction over laws of procedure. In Brazil, as in Argentina and in the United States, the Constitution provides for a dual form of judiciary, federal and state, although in practice its respective jurisdiction and powers are not always well defined.

Dr. Borchard (*op. cit.*) furnishes the following summary of old Portuguese and Spanish law which served as a basis for the legislation of Brazil on civil matters.

The antecedents of Portuguese Laws are:

The Visigothic Code (693) and the Decretals of the Councils, the customary law, the "foraes" or municipal charters and statutes, the Roman Laws, as found in the Breviarium Aniani (506), which was also in force in Spain, and the Siete Partidas (1263); the Common Law and the general work of legislation which began in 1211, at the time more or less of the Fuero Juzgo.

When in 1580 Philip I. of Portugal and II. of Spain united in himself the crowns of the two countries, the Ordenaçóes were revised, and under the name of Codigo

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Philippino was promulgated in 1603, and confirmed after the separation of the Kingdoms, by João IV. in 1643.

This Codigo Philippino or Ordenações Philippinas, or Ordinances of Philip I., constituted the main foundation of the Civil Law of Brazil, because under the rule of the Empire it was adopted and given force in the country by special law of October 20, 1823, and under the Republic by Art. 83 of the Constitution of 1891.

It seems to us apparent, even from this very brief review, that there are enough antecedents to consider it as unquestionable that the Civil Law of Argentina and Brazil can be taken as modern expressions of Roman Law, modified by the necessities and vicissitudes of the Nations through which it came to these two Republics as a legacy of augmented value.

As the analysis of the origin of the French Civil Law, as it culminated in Napoleon's Codification, is foreign to the scope of this course, we shall not go into its antecedents, although it is quite sufficient to state for the benefit of those who believe in the preponderant influence of the Code of Napoleon on the Codes of Argentina, Brazil, Chile, etc., that that influence was more noticeable from the point of view of innovation in the method and technique of the codes, than in the intrinsic make up. The same occurs today with the German Code, which is considered by many as the highest and most valuable labor of its kind, and called to have considerable influence in the elaboration of other Codes. But here again this influence will be as to the method and system of distribution of the matters, but in their essence (as to their institutions), they will, like the Napoleon Code, be based upon those which had their origin in ancient Roman Law.

SECOND SECTION.

United States—Antecedents of Its Law—English Law—Its Roman Origin.

While you will more or less readily accept that the laws of Argentina, Brazil and other countries of the South have their origin in ancient Roman Law either entirely or in

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part, in the minds of many will it be more questionable to accept that Common Law has the same connections with Roman Law as the laws of the countries just mentioned.

This fact has induced us to give more time to the review of the relationship between Roman Law and English Law, which we have done following Scrutton's "Roman Law and the Law of England," a book influenced by that strong pre-war tendency existing in Great Britain and in the United States, so humorously criticized by Chesterton, of finding a German ancestry to the best social and economic traits of the English speaking people. Everything that meant strength, character, virtue, power—it was a by-word that it had a Saxon origin, and its counterpart in weakness, wickedness, vice, debility, unreliance, was adjudged without further question as Latin. Of course, this was a last remnant of the justly rebellious, although now indiscriminating and not altogether just spirit, which governed England in its antipathy for everything which was Roman, regardless of whether it originated with its political ancestors, the Romans, or came from the Vatican.

But aside from that, you will find that the study of Ancient Roman Law will be a most valuable ally in the analysis of the Civil or Commercial legislation of Argentina, Brazil, Chile, etc., as it will also be in that of your own Common Law. The reason for the latter is to be found *in the influence of the Roman Law on the Law of England.*

Influence of the Roman Law on the Law of America Through Its Influence on English Law.

A careful survey of the field shows us that the subject can be divided for its study into two periods:

I. From the time of the Roman Conquest up to the arrival of Vacarius in 1143.

II. The period following the year 1143.

FIRST CYCLE.

During the four centuries of Roman domination in England, which began with the invasion of Julius Caesar in B. C. 55 and was completed by A. D. 43 under Claudius,

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the influence of Roman political and legal principles was preponderant in the Islands up to the year 410 A. D., when under Honorius the Roman Legions were withdrawn. It is argued that as the legal compilations of Justinian did not come into existence until A. D. 534, the influence of Roman Law in the Judiciary and in the very laws of England was limited and some pretend negligible.

These divergent views have given ground to two schools, one which states that Teutonic Law has contributed more in the elaboration of English Law than any other, and the one which predicates upon the decisive influence of Civil Law in that regard. There is another school of thought in this respect, although not as important as those previously mentioned, which pretends to discover a pure English ancestry to Common Law.

The analysis of this problem can be better made through an investigation of the works of writers on this subject, although, either by differentiation or by analogy of institutions, it is apparent to us that Common Law has had its origin in Roman Law.

Revising the contributions of Finlason, "Reeves' History of the English Law," and Coote, "The Romans in Britain," we find that the subject can better be analyzed by investigating the Roman contributions under the following heads:

I. Land Law.

II. Family Law.

III. Law of Courts and Procedure, Civil and Criminal.

IV. Law of Organization (a) Territorial (b) Municipal.

I.

Land Law—Scrutton in his well-known essay on "Roman Law and the Law of England" maintains that the Land Law during this cycle was in the main of Teutonic origin, as he finds no explanation for the "three field system," which whether tilled by a free community or as a manorial settlement covered the greater part of England.

In our opinion the success of the Roman Colonization was based upon the fact that it respected local customs.

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The features of the Land Law of England of this period, which in the opinion of Scrutton, do not admit the possibility of a Roman lineage, are, according to the theory of Seebohn, of South German origin, which in itself was deeply affected by the Roman, as it is recognized that some of the institutions of the South German tribes had Roman ancestry.

That the Roman Law influenced the Land Law of England during this period, is well proven by remembering the similitude of the *Folk-land* with the *Ager-publicus*, and the *Villiani* and the *Manorial Courts* with the *Villa* and *Coloni.*

II.

Family Law—Scrutton (*op. cit.*) claims also Teutonic origin for the Family Law of England, although admitting that it was influenced by the Roman through ecclesiastical channels in the time of Bracton. Scrutton quotes in aid of his theory a paragraph from Maine's Ancient Law, page 144, but in our opinion, after carefully reading the quotation from Maine, we find that Maine refers to *Patria Potestas*, which institution as we understand it, belongs almost exclusively to the Romans.

III.

Law of Courts and Procedure, Civil and Criminal—There seems to be a consensus of opinion that the introduction of the Charters and of writing as a mode of proof is clerical and probably Roman. Among the legal fictions which we find in old English Law, there is a process very similar to the *in jure cessio*, in fine and recovery.

IV.

Law of Organization—(a) *Territorial.* Finlason (*op. cit.*) comments on the fact that the (Hundreds) *Welsh Cantred* bears a great resemblance to the Roman *Centenarius ager;* and Coote in his work "Neglected Facts" finds a great similarity between the *counties* and the *Roman civitates.*

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(b) *Municipal*—With reference to the towns and guilds, Pearson in his "History of England in the early Middle Ages," Thomas Wright in his "Archealogy," Coote in "Neglected Facts" and "Romans in Britain," Finlason (*op. cit.*), all agree that those organizations are of undoubted Roman origin.

SUMMARY.

Scrutton (*op. cit.*), whose work we are reviewing, denies that Roman Law had any influence upon English institutions during this period, but the facts briefly mentioned above, which are strongly supported by Finlason (*op. cit.*), Pollock and Maitland in their "History of English Law," and scores of other prominent writers, show that even during this first period Roman Laws and institutions had an important influence in England.

SECOND CYCLE.

This second period, we may say, begins after Vacarius, the well-known Lombard jurist, arrived in England in 1143 with Theobald, Archbishop of Canterbury. Vacarius, who was trained in Justinian Law at the famous Bologna Law School, which contributed so much to extend and make such law popular, began lecturing at Oxford on Roman Law in 1149. From that time on and for many years there was a recrudescence in the interest shown for Roman Law. The Schools of Learning of York and Northumbria before their destruction by the Danes, were skilled in Roman Law, Bishops, writers, etc., continuing the teaching of Vacarius. In order to understand the circumstances under which this revival of Roman Law occurred with the arrival of the Lombard Jurist, we should mention that the Norman Conquest had taken place and that, through the efforts of William, a feudal system of Frankish type was established, the Bishops were removed from secular courts, starting the struggle between the Church and the State, and that some legislation as to married women had been changed.

The efforts of Vacarius were not entirely lost. John of Salisbury in Policraticus constantly cites the Civil Law,

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mentioning that in some cases this law has been referred to in English Courts. Edward I also favored Roman Law teaching, although his effort to secure the services of a noted jurist were frustrated. We will review now the influence that Roman Law had on English institutions through the works of classical English jurists.

Influence of Roman Law on Classical English Jurists.

This influence is very noticeable on the famous Glanvil's Work entitled, "Treatise on the Laws of England," which is the first systematic treatise on the subject and whose tenth book on contracts follows closely the Roman Law.

Bracton, in his "De Legibus et Consuetudinibus Angliae," composed of five books, follows in books 1, 2 and 3 the Justinianean division, *jus ad personas, vel ad res, vel ad actiones pertinens;* in books 4 and 5 follows less closely the Roman division of subjects, but accepts the fundamental division Actiones Reales: Possessoriae vel Petitoriae: Actiones Personales vel Mixtae. It is well recognized by English jurists that the work of Bracton the Justiciar, which was published between 1246 and 1267 under the reign of Henry III, is the most important one in the early legal history of England, and that same was strongly influenced by Justinian precepts.

In the year 1274 the Year Books began to be published. In 1292 appeared Thornton's "Summa de Legibus," and between 1290 and 1300, under the reign of Edward I, Fleta, "Commentaries Juris Anglicani" and "Britton" (Abbreviation of Bracton*) were published. These works show the great interest of that king in matters of legislation, and it is just to infer that they were influenced also by Roman Law, as they were merely compendiums of Bracton, which was lengthy and expensive, although always accepted as an authority.

Posterior to 1300 we discover the influence of Civil Law on Stamford's "Pleas of the Crown," who cites Bracton and copies his semi-Roman definition of theft; on William Fulback, "A parallel or conference of the Civil Law, the Common Law, and the Common Law of this realm of Eng-

*Perhaps Britton was John Le Breton, Bishop of Hereford. See Sherman, Roman Law in the Modern World, page 358, note.

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land, etc."; on Dr. Cowell, "*Institutiones Juris Anglicani ad methodum et seriem Institutionum imperalium compositae et digestae,*" who endeavors in 1605 to maintain the unity of the Civil and Common Law; on Sir H. Spelman, "On the Law Terms," who says that a great portion of our Common Law is derived from the Civil (unless we will say that the Civil Law is derived from ours), which Bracton also, above 300 years before, right well understanding not only citeth the Digests and Books of Civil Law, etc.; on Coke, "Institutes," who appears adverse to the enforcement of Civil Law, but recognizes its value, as it is proven by the fact that he cites Bracton.

Its Influence as Seen in the Decisions.

In 1702 Lord HOLT, giving judgment in *Lane* v. *Cotton,* an action against the Post Office for the loss of a letter, says, "And this is the reason of the Civil Law in this case, which I am loathe to quote, yet, inasmuch as the laws of all nations are doubtless raised out of the ruins of the Civil Law, *it must be owned that the principles of our law are derived from the Civil Law,* and therefore grounded upon the same reason in many places."

In 1704, Lord HOLT, in his celebrated opinion of *Coggs* v. *Bernard,* where he cites Bracton and the Civil Law, states: "This Bracton I have cited is, I confess, an old author, but in this his doctrine is agreeable to reason and to what the law is in other countries, the Civil Law is so." "I cite this author (Bracton), though I confess he is an old one, because his opinion is reasonable, and very much to my present purpose, and there is no authority in the law to the contrary." "I do not find the word 'mandatum' in any other place in our law, besides in this place in Bracton, which is a full authority, if it be not too old."

In 1717, in the "Grand Opinion," the judges decided on the Sovereign's right of disposing of the education and marriage of his grandchildren. The counsel for the Prince of Wales objected to Bracton "that is transcribed from Justinian." The judges dealt with this objection, supporting by majority the authority of Bracton.

Blackstone, in his "Commentaries," published in 1765, considers Glanvil and Bracton venerated authors; of the

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latter he says that his treatise "shows still further improvement in the method and regularity of the Common Law," and in connection with the doctrines of *Acquisitio Dominii Juris Gentium* says, "And these (Roman) doctrines are implicitly copied and adopted by our Bracton, and have since been confirmed by many resolutions of the Courts."

In *Ball* vs. *Herbert* (1789), Bracton's authority on the rights in public rivers was overruled, but this same opinion, cited in *Blundell* vs. *Catterall* (1821), was considered as good authority, "as it is no objection that he (Bracton) has availed himself of the very words of Justinian. It is impossible that he should not have found the principles then laid down in the Civil Law or in any other well-digested Code, for they are directly derived from the Law of Nature."

In *Gifford* vs. *Lord Yarborough* (1828), where Bracton had been cited as to acquisition by alluvion, it was admitted that Bracton followed the Civil Law, but he presents it as part of the laws and customs of England.

In *Nugent* vs. *Smith* (1875), the Master of the Rolls, on deciding on carriers' liability, said: "It is obvious, therefore, that Bracton or English Judges before him, adopted into English the Roman Law of Bailments."

Hale and Blackstone.

Sir M. Hale (1676) divides the law of England into Statute Law and Unwritten Law, and the latter into (a) Common Law, (b) those particular Laws which are applicable to particular subjects, matters and codes, explained to be, "the Ecclestiastical Law and Civil Law, so far forth as they are admitted in certain courts and in certain matters allowed to the decision of those courts."

This also was the opinion of Blackstone, who a hundred years afterwards makes use of citations and comparisons of Civil Law in his "Commentaries," considering same as the "originals of our Law." The influence of Roman Law in Blackstone's dicta is very noticeable when dealing with abortion, duress, *metus* and *vis*, on pirates, on treasure trove, on *bona vacantia*, on marriage, on legitimacy, on guardians, on tutor and curator, on spiritual corporations,

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on rights of ways, on inheritance, on monsters, on occupancy, on things personal, on animals, on *accessio*, on *confusio*, on the doctrine of consideration, on bankruptcy proceedings (*cessio bonorum*); on testamentary jurisdiction, on *donatio mortis causa*, on statute of distributions (*successio ab intestato*), on hotch-pot (*collatio bonorum*), on the definition of an action, on their division into real, personal and mixed, on justification as a defense for slander, on summons (*jus invocando*), on the doctrine a man's house is his castle, correlative to the Romans' refusal to allow even a summons to be served in a man's own dwelling, on bail (*satisdatio*), on defense (*litis contestatio*), on set-off (*compensatio*), on replications and pleas (*exceptiones*), *dilatory* (*dilatoriae*), and to the action (*peremptoriae*), on costs (*victus victori condemnandus est in expensis*), on witnesses (Roman Law requiring two when one is sufficient in common law), on the public examination of witnesses, which is not required by Civil Law, on the English Law's refusal "to let a man to privilege one crime by another," on the *ignorantia juris*, on high treason (*crimen laesae majestatis*), on forgery (*crimen falsi*), on maintenance, on champerty, on libel, on theft (*animus furandi, lucri causa*), etc., etc.

This very remarkable influence of Roman Law on English Common Law is well exemplified by the fact that, in *Acton* vs. *Blundell* (1843), a question concerning rights in a subterranean water course, the Digest was fully cited and Counsel intervened with the remark as quoted in Scrutton (*op. cit.*), "it appears to me that what Marcellus says is against you" (Marcellus was a member of the Legal Council of Antoninus Pius and of Marcus).

Influence of the Jus Gentium of Roman Law in the Chancery or Equitable Jurisdiction.

After the 14th Century Common Law Courts in England recognized no authority to Civil Law because they were led, as stated by Scrutton, by "the financial exaction of the Papal Courts and the controversies of the Reformation, to regard with suspicion and dislike everything savouring of Rome." But there were three important courts where Civil

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Law still remained with great influence, namely, Courts of Chancery, Courts of Admiralty and the Ecclesiastical Courts, and other minor courts like that of the Constable and Marshal.

Under Edward III, from 1358, the Court of Chancery began to grow and develop, due to the fact that the incumbents were mostly clerical persons familiar on that account with Civil Law, as the system was in use in Ecclesiastical Courts, and also due to the circumstance that there were six Masters of Chancery "as assistants in the Court to show what is the Equity of the Civil Law. These Masters down to the time of Lord Bacon sat upon the Bench with the Chancellor as they were chosen men, skillful in Civil and Canon Law."

Under Charles I it was ordered that half of the Masters in Chancery should always be Civil Lawyers.

Its jurisdiction may be appraised from the words of James I's speech: "When the rigour of the law in many cases will undo a subject, there the Chancery tempers the law with Equity, and so mixes Mercy with Justice."

Equity and *Jus Praetorium* are very analogous. One based on natural law or Golden Age rulings whose fragments or precepts are embodied in the edicts of the Praetor, the other on the position of the King as a fountain of Justice.

Uses and Trusts found their source in the Fideicommissa introduced by the Romans to evade the strict rules as to legacies and succession. Professor Russell of Roman Law at New York University Law School, says that the latest teachings at Oxford contradict that assumption.

Mortgages were affected by the principles of Civil Law; and Coote, cited by Scrutton, says that mortgage "is now a security founded on common law and perfected by a judicious and wise application of the principles of redemption of the Civil Law." In the words of Scrutton (*op cit.*), "the strictness of Common Law viewed the mortgage in the light of a conditional grant of land by the mortgagor to the mortgagee, the condition being that the land should revert to the grantor on payment by a certain day of the money lent. If not, the land was discharged from the condition and became absolutely vested in the mortgagee. But the

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Civil Law (Argentine Civil Code, for instance, Art. 3142) regards the debt as principal and not the land. This construction was adopted under Charles I, who permitted an "equity of redemption" to the mortgagee.

Interpretation of Legacies and Documents.

In this respect Equity adopts *ad libitum*, the rules of Civil Law. In *Hooley* vs. *Hatton*, cited by Scrutton (*op. cit.*), Lord THURLOW, in his judgment, said: "No argument can be drawn in the present case from internal evidence. We must, therefore, refer to the rules of the Civil Law."

The jurisdiction of the Chancery over *incapables*, infants, idiots and lunatics is analogous to that of the Praetor and has been exerted, with respect to the appointment of guardians, in consonance with the precepts of the Civil Law.

English Law of Partnership is partly founded upon Civil Law. Justice STORY has confirmed that, in reviewing the close relationship between Common Law and Roman Law in this respect, both admit the difference between a *partnership* and a community of interests, providing that no new partner can be introduced without the concurrence of the original partners. There are also other striking similarities pointed out by Justice Story in his book on Partnership, as well as a notable difference, namely, English partners are liable *in solido*, while under Roman Law they are liable *pro parte*.

Specific Performance under Equitable Jurisdiction has been noted to be not entirely derived from Roman Law, which only gave damages for breach of contract.

The term "conscience" has its equivalent in the precept of *aequitas sequitur legem* and is like the Praetorian notion of *bona fides* as interpreted by Scrutton, who points out that both the Praetor and the Chancellor have powers or jurisdiction based upon the Roman Law of *naturalis justitia* to relieve against accident; in case of fraud to cancel and deliver up deeds, *restitutio in integrum* and *actio de dolo;* in case of mistake to give relief, be it mistake of law or of fact; the *injunctions* of the Chancery are similar to the Praetorian "interdicts," etc.

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Re Ecclesiastical Courts.

These courts had jurisdiction in three matters: *Pecuniary,* tithes, delapidations, etc.—*Matrimonial cases*—validity of marriage, legitimacy, divorce, etc.—*Testamentary*—Intestate causes.—Having acquired jurisdiction in a certain matter in the clerical courts, its rulings were exercised in conformity with the principles of the Canon and Civil Law.

Re Admiralty and Law of Merchants.

The old Law of Merchants, Law Marine or Customs of the Sea governed from ancient times the business of merchants and mariners. The jurists of Rome, taking many of its rules from the Rhodian Code, extended the precepts of the Customs of the Sea in the different communities of the Mediterranean. Therefore the Consolato del Mare (Barcelona), the Laws of Oleron (Bordeaux) are largely inspired by the Civil Law.

Admiralty Law is grounded on Civil Law as embodied specially in the Roll of Oleron and its different applications and on the subsequent customary and written rules which were accepted or created as commerce grew. Zouch, in "Jurisdiction of Admiralty of England Asserted," quoted in *op. ibid.,* says: "Business done at sea are to be determined according to Civil Law, and equity therefore, as also, according to the customs and usages of the sea * * * for instruments made beyond the sea have usually clauses relating to Civil Law and to the Law of the Sea," in which Blackstone fully agrees.

We find in the Roman Law the fountains or origins of: charter parties; Bottomry (*pecunia trajectitia vel nauticum joenus*); average (*contributio*); procedure in rem against a vessel (*Noxa caput sequitur*), etc.

Law of Merchants.

Bracton is the first one to recognize special forum to mercantile matters. The order of attachments, summons, etc., was changed *pro favorem mercatorum.* The Court of Piepoudré was established to further that end and sat

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in 1478 from hour to hour administering justice to dealers in time of fair and was so called "because justice was done while the dust was still on the foote, or before it could be shaken off" * * * *quibus exhibetur justitia pepoudrous.*

Zouch, Blackstone, Sir John Davies, cited by Zouch, recognize a different foundation to the Lex Mercatoria from the Common Law, taking the position that it is founded on the "law of nature and nations," which has been accepted and is adhered by the municipal laws. The Lex Mercatoria is partially grounded on the Civil Law and there are cases cited that were decided by the Digest. Lord Mansfield so admitted when he organized modern mercantile law on precepts taken from Roman Law.

The influence of this legal ancestry is well noticeable in the modern system of commercial law in reference to general average (*actio ex aversione*); to jettison (*removendi communis periculi-causa*), to insurance, to Bottomry and Respondentia (*pecunia trajectitia*); maritime hypothec, etc.

Influence of Roman Law on Common Law Ancestry of English Law of Bailment.

The influence of Roman Law on Common Law is well demonstrated in several instances, but very specially in connection with the law of Bailments, in that part which concerns the liability of a common carrier.

Beale, in his Law of Bailments, quotes as authorities on the subject Chief Justice Holt, Sir William Jones, Joseph Story, Isaac Edwards, and these jurists refer us to their authorities, Bracton and the Civil Law.

In *Nugent* vs. *Smith* the Master of the Roll said: "No one who has read Story and Sir William Jones on Bailments, and the judgments of Lord Holt in *Coggs* v. *Bernard,* can doubt that the Common Law of England as to bailments is founded upon, though it has not exactly adopted, the Roman Law. It is true that Lord Holt rests as for authority solely on Bracton, but the treatise of Bracton adopts all the divisions of Roman Law in the very words of the Roman text, and further adopts the exception of the Roman Law and the Roman reason for it. It is obvious that Bracton or

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English judges before him adopted into the English, the Roman Law."

The case of *Coggs* vs. *Bernard* is considered the proper test. The facts are as follows: Coggs, the plaintiff, declared that Bernard, the defendant, offered to take up several hogsheads of brandy then in a certain cellar and to lay them safely down again in a certain other cellar. The said defendant and his servants and agents put them down again in the other cellar *quod per defectum curae ipsius* the defendant, his servants and agents, one of the casks was staved and a great quantity of brandy was spilt. After pleading not guilty, the case was heard and a verdict for the plaintiff entered. The defendant filed a motion in arrest of judgment on the grounds that the complainant failed to allege in the declaration that the defendant was a common carrier, or to aver that the defendant had anything for his pains.—Defendant held liable.

Scrutton (*op. cit.*) and O. W. Holmes, "The Common Law" (page 180), maintains that the general law of bailments up to *Coggs* vs. *Bernard* was Teutonic and not Roman, because the Roman precepts excused *casus fortuitus* or *vis major,* while the English had a stricter liability, and that the conception of a "common calling" had also been in existence for the century before *Coggs* vs. *Bernard.*

This argument of Scrutton seems to us untenable because he himself admits, *ut supra,* in the same chapter, that "the judgement of *Coggs* vs. *Bernard* overthrew Southcote's case and the Old Common Law." *Ergo,* if Lord Holt's judgment overthrew an established rule his doctrine was not the prevailing one.

In order to have a clearer idea of the subject-matter it is advisable to remember at this juncture that the word "Bailment" is derived, according to Blackstone, from the French *bailler*—to deliver. In different French Law dictionaries the word has the meaning of—to commit, deliver, pawn, to let forth, to lend.

Story in his commentaries on the Law of Bailments considers that "it may be said that a bailment is a delivery of a thing in trust for some special object or purpose, and upon a contract, expressed or implied, to conform to the object or purpose of the trust."

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Now, with this basis we may examine the conclusions of Lord Holt in discussing six sorts of bailments, in which he adopts and systematizes Bracton's doctrine founded on the *Institutes*, which Bracton had copied almost word for word.

1st. Of Depositum or naked bailment (see, also, Kent's Commentaries, Vol. 2, p. 560). Where one delivers goods to another to keep for the use of the bailor. The bailee is not answerable if they are stolen without any fault of his. Neither will a common neglect make him chargeable, but he must be guilty of some gross neglect (*magna culpa* or *lata culpa*).

2nd. Of Mandatum (Kent, *op. cit.*, p. 569), where there is delivery of the goods or chattels to somebody who is to carry them or do something about them gratis without any reward for the work or carriage.

3rd. Of Commodatum or Loan (loan for use, different from a loan for consumption or the *mutuum*). See Kent, *op. cit.*, page 574. Where goods or chattels that are useful are lent to a friend *gratis* to be used by him and the thing to be restored in specie, the bailee is bound to strictest care and diligence to keep the goods and restore them to the lender.

4th. Of Pledging (*Vadium or Pignus*). See Kent, *op. cit.*, page 578. Where goods or chattels are delivered to another as a pawn, to be a security to him for money borrowed of him by the bailor. If the bailee uses the goods, he is liable for the loss, as it is merely in the nature of deposit.

5th. Of *Locatio operis faciendi* (see, also, Kent, *op. cit.*, page 585). Where goods are delivered to be carried, or something is to be done about them for a reward to be paid by the person who delivers them to the bailee who is to do the thing about them. The delivery may be either to one who exercises a public employment, who is bound to answer for the goods at all events, or to a private person who is only to do the best he can.

6th. *Locatio et conductio, or hire,* where the goods are left with the bailee to be used by him for hire. The bailee is bound to take the utmost care and return the goods when the time of the hiring is expired.

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Influence of Roman Law on International Law, Private and Public.

By the reference made previously in treating the subject of Lex Mercatorium and Admiralty, we noticed the close relationship between the ancient Roman Law and the law of nations. Sir Henry Maine, in his Cambridge Essay, 1856, and also in his remarkable masterpiece, "Ancient Law," confirms the importance of its study in this connection, which is easy to understand when we take into consideration that the Roman Empire extended *urbi et orbi* its rule in communities of the most heterogeneous kind.

Therefore, as Professor Russell, states in his Outline Study of Law, 2nd Edition, page 89: "The student of International Law and diplomatic history cannot afford to be ignorant of Roman Law. Its literature for generations, including both treatises and conventions, is the common tongue of Christendom, and all technical expressions to be found are used in the recognized sense of legal Latinity."

Conclusion.

It is therefore not adventurous to believe that Roman Law had a considerable influence on the present Common Law of America as inherited by this country from the English.

For over one hundred and fifty years American students have taken from Blackstone the inspiration which has guided their legal training, and Blackstone was antagonistic in theory though not in practice to Civil Law. But Reeves' "History of the English Law," following Guizot and Mackintosh, and Pollock and Maitland in their splendid "History of English Law," hold the other sounder view. Charles F. Beach, in his address, "The Civil Law in America," citing Mackenzie's Studies on Roman Law, says: "In Scotland a knowledge of the Roman Law has always been regarded as the best introduction to the study of the municipal law."

But aside from the advantages which this study has in connection with Common Law as it constitutes an essential ground for legal construction and interpretation of modern juristic problems, there is a favorable political reason to be taken into consideration.

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The economic future of the United States seems to be closely bound to that of the countries south of the Rio Grande. That enormous area of the world, considerably larger than the United States and with a population almost equal, is governed in its relationship of family and property by the Civil Law.

The future of a closer relationship between the American communities largely depends on a mutual knowledge and appreciation of one another, and this can better be accomplished from the United States side by generalizing among the studious the notions which rule property and the family in the republics of the South, as their law is truly representative of their social and economic characteristics.

THIRD CHAPTER.

III. *As an Indispensable Auxiliary for Americans Interested to Create a Better Understanding bewteen United States and the Other American Nations, Taking into Consideration the Economic Future of These Relationships.*

The education of the Americans through able leadership by the universities, is very rapidly equipping the younger element of the country for its future task of international trader.

Years ago foreign trade was a myth, dwelling only in the exalted brains of some missionaries. But after the crisis of 1907, the people at large began to lend an ear to those pioneers, and little by little the universities and schools of the country intensified the teaching of languages.

Such was the situation up to 1914, when most of the citizens of the United States believed that their country had a foreign trade, a belief which, with the increased figures of exports and imports resulting from the war activities, convinced the average American that the United States as a foreign trader will soon have no rival.

It has been necessary to be under the spell of a bad and dangerous crisis as that of last year, to begin an investigation and statistical research which soon revealed this astounding fact: that the United States was not a foreign

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trader, although it might become one and was bound to become one for its own prosperity's sake.

And the reason why the United States is not a foreign trader is a very plain one. The exports and imports of the country, even running into billions of dollars, do not represent ten per cent. of the total domestic trade of the country. In other words, the wants of the American commonwealth are such that its local trade is, or was, considerably larger than its foreign trade; therefore, the interest of the average merchant and manufacturer is in a minimum part or not at all affected by foreign trade.

But, as we say, such a state of affairs is changing very rapidly. The industries which were abnormally developed during the war, are facing an over-production without markets for distribution.

But with the knowledge of what the country was not, also came the certainty that foreign trade cannot be improvised; and that experience, business tradition, and men with the right spirit, were essential elements of success.

It is a well-known fact that legal work follows always in the path of commercial transactions, and that to larger business dealings corresponds an increase in the activities of the lawyers; a circumstance which is even more noticeable under the present state of affairs, when the two parties engaged in this trade, to wit: Argentina, Brazil, etc., on one side, and the United States on the other, are neophytes.

We do not have to demonstrate with figures which, it is assumed, are well-known to you, that the capacity for foreign trade of this country has increased and it is beginning to establish the same on the true basis, of a direct relationship between the manufacturers here and the consumers abroad.

The logical markets for this country, as Roosevelt predicted, are those of countries like Argentina, Brazil, Chile, etc.

Argentina with an area seven times that of Germany, and with room for two hundred millions of inhabitants, has a population that, although it numbers less than ten millions, trades more than China with 300,000,000, just because the average Argentine lives better, eats more, dresses better,

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works more and expends more—in other words, has a higher economic value.

Brazil has likewise an enormous territory and natural resources in quantity, and offers with a larger population good possibilities for trade. And not only these two countries are of interest, but the whole of South and Central America, with part of North America, with an area more than double that of United States and with an almost equal population, offers an unlimited field in legitimate ventures for work to the type of American that the war has returned.

This new condition of affairs will produce a closer relationship, which will call for the cooperation of men not only of the profession of merchants, but of men with a greater vision as to the possibilities of any enterprise, a vision which is absolutely impossible for those not realizing in a full measure, *the spirit of the people abroad.*

To cultivate that knowledge, the studies of subjects like this cannot fail to be of importance, as well as give a broader idea and inside view of the social institutions, the family and property. It will soon bring the student nearer to the idiosyncracies and peculiarities of a different people, thereby endowing him with a greater capacity for understanding based, not upon a feeling of indulgence toward those belonging to smaller nations, or charity or international pity, but upon appreciation and consideration.

To contribute to that education there have been established, with able professors in different schools and universities, courses on Commercial Law. Their number is increasing every year. Of Courses on Civil Law, this is the first one to our knowledge. This initiative represents a grade more, a higher step towards the completion of that general education of this American generation for the fulfillment of its international duties.

The war has once for all destroyed the pretended provincialism of the United States. It is not without deep consequences to the intellectual make-up of its manhood, that a country sends into the University of the World three million men, and pays them for a trip abroad, to get into contact under different suns with other people and customs.

The teaching of Civil Law of Spanish America will make more than good traders and exploiters of natural resources

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in far-away countries; it will give a general political and social training enabling the men to cooperate with a sense of proportion in any legislative work here or abroad. Lawyers so trained would have acquired a true key to the interpretation and integration of legal precepts of the statutes at home and of foreign nations, whereby international law, public or private, will have fewer mysteries. They may be called to represent their country in international conferences, and will be able to serve its best interests and those of the world community in a more efficient manner.

It may be said that we are indulging in exaggerations or generalizations, but in our opinion there is no limit to the possibilities of a study that will acquaint you with a foreign country through its fundamental institutions under the present social regime, namely, the family and property.

Another one of the advantages of this study is that it might help to eradicate the notion from the American mind that there is a community of ethnographic, economic, political, etc., oneness which may be designated as Latin America or South America or Spanish America. Hence that we have often shunned using those expressions.

There is nothing more misleading than those global classifications. They are comfortable but inexact. The Nations south of the United States are going to develop their personality independently of each other and they are doing it now. In certain respects they are as different from one another as they are from the United States.

From the purely economic point of view the necessity of expansion for the United States is well illustrated by the fact, that the production of the country has overtaken and exceeded the buying power here. There is a surplus of goods over domestic requirements. The buyers strike at home, to quote the words of a very well-known banker, and inadequate facilities abroad have caused the piling up of goods in our markets and the closing of mills and factories.

It is conservatively estimated, adds Mr. John McHugh, "that (2,000,000) two million people are out of employment in the United States. For generations the business of the country was practically self-contained. We consumed what we produced. The last six years, however, have seen a market changed. Because of the tremendous demand abroad

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for American goods created by the world conditions, our industries have greatly increased their capacity for production, so that our farms, factories and mines are now equipped, both in labor and machinery, to produce a great surplus of goods, products and raw materials, beyond our domestic needs. In order to put the 2,000,000 men back to work and dispose of a surplus production, the dead-lock that exists in connection with our foreign trade must be broken. In 1920 the exports of the United States exceeded $8,100,000,000 and the imports $5,468,000,000. These figures alone will give an idea of the importance of the movement to educate and prepare your citizens for foreign trade.

Taking into consideration that everything almost, from an industrial point of view as well as from that of the development of the natural resources of the countries of the South in their various rich zones, has yet to be developed, it is suggested that investments of money should be made in that connection as an adjunct of foreign trade. The logical ground for financial operations is not Europe, nor Asia, nor Africa, but the Americas. England alone has invested over $2,000,000,000 in Argentina. That country in itself, with a foreign trade which in 1918 was over $1,300,000,000, offers an unsurveyed field for investments. Once its industries are developed, the country will have moved forward one step further in its evolution towards the industrial stage, in which period, the great fortunes of the country will be made.

However limited may be the usefulness of the study of Civil Law of the so-called Latin American communities, we cannot but feel that it will contribute in not a small measure, if consistently carried out, to prepare Americans for the great future that awaits the country in international life, considered either from an economical or a political point of view.

Final Conclusions.

Summarizing the advantages that may be derived from a course like this, it might be said:

First: It should give the student a key to the interpretation of the most important underlying ideas governing family and property relations.

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These two institutions, family and property, and their relations, are the subject almost exclusively of the Civil Law of the so-called Latin-American countries.

It is hoped that the student will secure by it a practical legal knowledge which will greatly assist him in his professional work, as an expert in this line, work which will be rendered considerably more important and remunerative by the daily growth of the commercial and political intercourse between Argentina, Brazil, Chile, etc., and this country.

Second: It is also hoped that these lectures will furnish the student with elements to analyze how a country eventually ends by codifying its substantive Law, and the benefits which may be secured thereby mainly by new Nations. The investigation of this problem of codification or unification of substantive laws is one from which valuable information can be secured for the interpretation and aid to the growing tendency of this country towards unity of legislation.

Third: It is finally hoped that this course will acquaint the student with several fundamental principles of Civil and Roman Law which have so influenced the institutions of American and English Common Law, thereby increasing his ability to cope with many of the new legal problems offered in the practice of the profession.

I am deeply appreciative of the honor which it means to address you and to be connected with this very illustrious University. The knowledge that such a distinction has been bestowed upon an Argentine, the first from that country to hold this appointment, will go a long way toward consolidating that growing good-will and friendship which is felt in Argentina towards you.

My Argentine alma mater, the National University of La Plata, had the honor a few years ago of counting among the members of the faculty a distinguished American scholar and statesman, Dr. Leo S. Rowe, at present Director General of the Pan-American Union; the learned jurist and professor of this house, John Bassett Moore; Professor Shepherd, also of Columbia, Professor Ross of Wisconsin University, of whose teachings I have the most pleasant recol-

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lections, and many others have also visited in different capacities and occasions my country; to them is due the high esteem and regard enjoyed by your Institutes of Learning in Argentina.

If I can contribute by these Lectures with a modicum to the already very advanced work of intellectual fraternization between the United States and Argentina, work in which I had such a distinguished antecessor, I shall be satisfied.

THIRD PART.

PROGRAM OF STUDY AND SYNOPSIS OF THE FIFTEEN LECTURES.

FIRST LECTURE.

Importance of the study of Argentine and Brazilian Civil Law for the New York Practitioner. Discussion on Codification, its value from a social, political and constitutional point of view. Scope of Civil Law in Argentina, Brazil, Chile, etc. Family. Property. Recommendations with reference to the Course.

(a) Its Most Important Characteristic is the Codification of Substantive Law. The Argentine and Brazilian Civil Codes as antecedents in favor of codification.

(b) History of the Argentine and Brazilian Civil Codes. Scope of Civil Law. Family. Property.

(c) Discussion of the value of codification. Could it be accomplished in the United States? Indicate how, sooner or later, substantive law is crystallized into flexible or rigid code.

(d) Problems of Constitutional Law affecting Codification or unification of substantive Laws.

(e) Elements necessary to make this study profitable. A knowledge of Spanish, which can be acquired contemporaneously, and also of Roman Law, is necessary.

(f) Bibliography (Analysis of the different books).

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SECOND LECTURE.

The Laws of Persons—Capacity.

(a) Juridical Persons—Definition—Beginning and end of their existence (their capacity will be treated in lectures Six and Eight).

(b) Natural Persons—Definition—Capacity.

I. Of Unborn Persons.

II. Of the Existence of Persons Before Birth.

III. Of the Proof of Birth.

IV. Of Absentees with Presumption of Death.

V. Of Minors. (Titles IX and XIV Argentine C. C.)

VI. Of Insane Persons.

VII. Of Deaf Mutes.

VIII. Of Guardianship.

(a) Granted by the Parents.

(b) By Law.

(c) Dative.

(d) Of Illegitimate Children.

(e) Special.

(f) Its Granting and Termination.

IX. Of Curatorship.

X. Capacity of Persons domiciled in the country or abroad. (Argentine C. C. Articles 6, 7, 948, 949.)

XI. Other Rules of Civil Law *re* Capacity.

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THIRD LECTURE.

On the Family Law.

Of the Rights of Family—Marriage—Divorce—Civil Registry—Validity of Marriages and Divorces Contracted or Granted Respectively Out of the Jurisdiction.

I. Of Marriage.

(a) Rules governing Marriage. (b) Of impediments. (c) Consent. (d) Proofs of Marriage, and void and voidable marriages. (e) Penal provisions. (f) Rights and duties of husband and wife. (g) Of the regime of property between spouses acquired before and after the marriage. (h) Of Parental Power.

II. Of Divorce.

(a) Grounds for Divorce. (b) Effects of same. (c) Validity of Marriages and Divorces contracted or granted outside of the jurisdiction. (d) The personal statute and the principle of the law of the Domicile.

III. Of Children.

(a) of legitimate children. (b) of illegitimate children (natural, adulterine, incestuous and sacrilegious). (c) Of adoption. (d) Of legitimation. (e) Of the investigation of Paternity.

IV. Of the Civil Registry—Its scope. Functions and connections with compulsory military service registration.

FOURTH LECTURE.

Domicile—Its Different Legal Aspects.

I. Elements necessary to be considered.

II. Real.

III. Legal.

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IV. Of Origin.
V. Of Law.
VI. Of the Family.
VII. Of Public Employees.
VIII. Of Natural Persons.
IX. Several Residences.
X. When no fixed Residence.
XI. Change of—How effected.
XII. Proof of Intention.
XIII. Of Juridical Persons.
XIV. Established by Charter or by Laws.
XV. Suits against Government.
XVI. Of Private Juridical Persons.
XVII. Of Foreign Juridical Persons.
XVIII. Of Incapables.
XIX. Of Married Women.
XX. Soldiers and Sailors.
XXI. Of Persons of the Merchant Marine.
XXII. Of Prisoners and Exiles.
XXIII. Ministers and Consuls.
XXIV. Established by Contract.
XXV. Right of Husband to Fix and Change.
XXVI. Duty of Wife to Follow Husband.
XXVII. Special for Citation.
XXVIII. Of Debtor as place of Payment.
XXIX. Of Deceased, successions opened at last.
XXX. Inventory and Partition.

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FIFTH LECTURE.

Rights of Nationals and Foreigners—Citizenship Problems—Jus Soli—Jus Sanguinis—Foreign Laws—Their Application and Enforcement.

I. From an Argentine Constitutional point of view.

(a) Why is it a subject of constitutional law. (b) Citizenship not compulsory. (c) Entry into territory is not restricted. Limited or obstructed. (d) Enjoy same civil rights. (e) Immigration of Europeans encouraged. (f) Laws are binding on foreigners. (g) Have the right to engage in industry, commerce or profession. (h) Aliens have the right to own and sell real estate. (i) Also the right to dispose of their property by Will. (j) How citizenship can be secured. (Naturalization) (k) Citizens by naturalization exempt from Military Service. (l) The provinces cannot enact special laws *re* naturalization. (m) Law enacted by Congress.

II. Doctrines from the point of view of Municipal Law.

(a) Jus Soli (by birth). Governs the legislation of the American countries. (b) Jus Sanguinis (by blood). Adopted in Europe. (c) The rule that a minor follows the nationality of the parent is not always accepted. (d) How citizenship can be secured. (e) Rules adopted by certain countries. (f) The nationality of the Indians.

III. Conflicts of Law *re* Nationality.

(a) Subject of American Private International Law. (b) Tentative rules for the solving of these conflicts. (c) Application of these Rules to the case of children born of foreign parents. (d) To the case of married women. (e) Citizenship by naturalization. (e) Rules *re* loss of citizenship. (f) How can Citizenship be regained. (f) Proofs as to Nationality.

IV. Civil Law Principles *re* Foreign Laws; their application and alien's rights.

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(a) Application of Brazilian Laws Abroad. (b) Promulgation of Brazilian Laws abroad. (c) In Argentina and Brazil Foreigners are entitled to all civil rights. C. C. B. Art. 3. A. C. C. Art. 20. (d) Argentine Civil Law; *re* Alien absentees; acts and contracts of aliens; laws governing capacity of aliens; birth proof of aliens. (e) When will Brazil apply the law of nationality. (f) When the law of double nationality is considered applicable.

SIXTH LECTURE.

Of the Law of Property—Possession—Inviolability of Property—Expropriation—Literary, Scientific and Artistic Property—Trademarks and Patents.

I. Of the Law of Property and Possession.

(a) Immovables. (b) Movables. (c) Semovientes (cattle). (d) Acquisition and loss of movables and movable ownership. (e) Immovables by their representative character. (f) Of *joint ownership.* (g) Of Possession and its Classification. (h) Acquisition and effects of Possession. (i) Of Possessory Actions and the loss of Possession. (j) Inviolability of Property and the right of Expropriation. (Argentine Constitution, Art. 17 and Arg. C. C. 473, 1358, 2545, 2547, 2671, 2895, 3212, *Seq.*)

II. Literary, Scientific and Artistic Property.

(a) The Argentine Law No. 7092. (b) The Brazilian Civil Code. (c) How regulated. (d) Exclusive rights of Authors. (e) Rights of Heirs and successors. (f) Public Property if no heirs. (g) General right of succession, journalists, writers, editors, and moving picture operators. (h) Registry of copyright.

III. Trade Marks and Patents.

(a) Trade Marks. (b) Pan American Conventions and Havana Bureau. (c) Argentine Trademark Law No. 3975. (d) Brazilian Trade Mark Law No. 1236. (e) How to protect your client against piracy. (f) Rights of Inventors

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and Patent Rights. (g) Extension and value of Patents granted in the United States. (g) Conventions and Treaties.

SEVENTH LECTURE.

Mortgages.

I. General Rules and Definitions. II. Legal Mortgages. III. Registration. IV. Modes of Extinction. V. Mortgages of Railroads. VI. Argentine Law of Debentures.

I. General Rules and Definitions.

(a) Things subject to mortgage. (b) Civil law governs mortgage and mortgage actions. (c) Several mortgages on same property. (d) Redemption. (e) Rights of Creditors, auctions. (f) Extension and renewal when and how. (g) Mortgage suits by executive action. (h) Rules governing the mortgage of ships.

II. Legal Mortgages.

(a) When established by law. (b) Inscription, Extension, renewal, cancelation.

III. Inscription or registration of mortgages.

(a) Deeds and formalities which are essential. (b) Rights of priority in case of several mortgages. (c) Effects regarding third persons and between the parties.

IV. Modes of extinction.

(a) Effective from notation. (b) How is cancellation affected.

V. Mortgages of Railroads.

(a) Place of registry. (b) Operation not to be affected. (c) Scope of Mortgage and rights of creditors. (d) Foreclosure, lien of Government. (e) Special power required for foreclosure.

VI. Argentine Law of Debentures—Scope and importance of this law. No. 8875.

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EIGHTH LECTURE.

On Juristic Persons—Corporations—National and Foreign —Analysis of Dr. Moreno's Study in Legal Doctrines on Corporations.

I. Definition and Classification.

(a) Public. (b) Private. (c) When their existence begins. (d) Domicile. (c) Capacity. (f) Rights of members. (g) Rights as to third persons. (h) How their existence ends. (i) Disposition of assets after dissolution.

II. Corporations, National and Foreign. Constitutional Privileges and Liabilities.

(a) Right to acquire real property. Accept Legacies. Establish servitudes, to receive by testament, receive usufruct of property. (b) Associations or corporations that are not Juristic persons.

III. Analysis of Dr. Rodolfo Morenoa, Jr.'s study of comparative Civil Law *re* Corporations and the Doctrine governing same.

NINTH LECTURE.

How Can a Foreign Corporation Do Business In Argentina, Brazil, Chile, etc.—Taxation, Railways, Banks, Navigation Companies—Principle of Reciprocity—Argentine Law 8867—Civil and Commercial Law on This Subject.

I. (a) Constitutional limitations. (b) Two methods (Domestication or organization of a local corporation. (c) Procedure for Domestication of the American Company. (d) Documents needed and requisites. (e) Legalization and translations. (f) Procedure for organization of local companies. (g) Incorporators. (h) Board of Directors. (i) Publicity of balance sheets and annual reports. (j) Stockholders' meetings. Proxies. (k) Stockholders abroad —their rights.

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II. Taxation. (a) National and Municipal. (b) Expenses for registration or organization of corporations. (c) Time.

III. (a) How business can be handled by the parental company and control maintained. (b) Classes of stock. (c) Acquisition of real estate, entering bids for public works, furnishing bonds, etc.

TENTH LECTURE.

Liabilities of Corporations—Criminal and Civil—Agents, Representatives, etc.

I. (a) Local Boards. (b) Representatives. (c) Agents. (d) Powers of Attorney. (e) Revocation of Powers of Attorney by mail or by cable.

II. (a) Criminal and Civil Liability of Corporations, in Argentina, Brazil and Chile. (b) How to limit same. (c) Jurisprudence on this subject. (d) Differences between the Argentine and the Brazilian law. (e) Procedure in case of litigation, summons, depositions, witnesses, bonds for appearance, etc.

ELEVENTH LECTURE.

Notarial Organization—Private and Public Documents—Deeds—Powers of Attorney—Documents "Habilitantes"—Certifications and Legalizations—Letters Rogatory—Evidence—Witnesses.

I. (a) Notarial Organization. (b) Scope and nature of the duties and obligations of Notaries.

II. (a) Juridical Acts. (b) Form and requisites. (c) When valid without regard to form. (d) When invalid. (e) Declaration of facts. (f) Consent how proven. (g) Effects and requirements of public instruments. (h) When a public instrument is essential. (i) Validity of private instruments, how proven. (j) Modes of proof of juridical acts. (k) Value of certified copies. (l) Copies by public officials. (m) When considered as public documents. (n)

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Documents in foreign languages, translations. (o) When is proof by witness valid.

III. (a) Deeds. (b) Forms. (c) Powers of attorney, requisites. (d) Documents habilitantes. (e) Certifications and Legalizations. (f) At Consulates. (g) At the Department of Foreign Affairs. (h) Evidence and witnesses. (i) How to handle rogatory letters. (j) What the Code of Civil Procedure of New York requires.

TWELFTH LECTURE.

The Law of Obligations, Its Theory—Ex Contractu—Ex Delicto—Liberty and Freedom to Contract, Limitations.

I. Nature and origin of obligations. (a) Of natural obligations. (b) Damages in obligations in which sums of money are not the object. (c) Of principal and accessory obligations. (d) Of conditional obligations. (e) Of limited obligations.

II. Obligations with relation to their object and to persons. (a) Obligations to give. (b) Obligations to do or not to do. (c) Of alternative obligations. (d) Of optional obligations. (e) Of obligations with a penal clause. (f) Of divisible and undivisible obligations. (g) Of purely joint obligations. (h) Solidary obligations. (i) Of the acknowledgement of obligations.

III. Extinction of Obligation. (a) Of Payment. (b) Of Novation. (c) Of Compensation (set-off). (d) Of compromise. (e) Of confusion (merger). (f) Of the waiver of the rights of creditors. (g) Of the remission of debts. (h) Of the impossibility of payment.

IV. Liberty to contract as a Constitutional Provision. Its limitations—Differences between the Argentine Law of Obligation and the Brazilian Law of Obligation, showing the good points of this Law.

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THIRTEENTH LECTURE.

The Effects of Contracts. Laws Ruling Same In Case of Conflict of Laws—Locus Regit Actum. Lex Rei Sitae. Lex Loci Contractus.

I. Obligations Ex Contractu—Bilateral and Unilateral. (a) General Rules. (b) Consent. (c) Effect of offer. (d) When offer ceases to be obligatory. (e) Belated Acceptance. (f) Altered acceptance as new offer. (g) Tacit acceptance. (h) Withdrawal of acceptance. (i) By correspondence. (j) Made in place where proposed. (k) Retraction before signing public instruments. (l) Inheritance of living person not object of contract. (m) Interpretation of beneficial contract. (n) Impossibility of performance. (o) Bilateral contracts, both parties must perform. (p) Security may be required. (q) Rescission and damages for non-performance.

II. (a) Contract of conjugal partnerships. (b) Of purchase and sale. (c) Of Assignment of Credits. (d) Of exchange. (e) Of lease and hire. (f) Of partnership. (g) Of donations. (h) Of Mandate. (i) Of suretyship. (j) Of aleatory contracts, gaming, betting and chance. (k) Of onerous contract of life annuity. (l) Of eviction. (m) Of redhibitory vices. (n) Of deposit or bailment. (o) Of mutuun or loan for consumption. (p) Of commodatum. (q) Management of another's affairs (negotiorum gestor).

III. Conflicts of Law. Application of the Principles. (a) Lex Regit Actum. (b) Rex rei sitae. (c) Lex loci contractus. (d) The Congress of Montevideo and the principles of private international law enacted then.

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FOURTEENTH LECTURE.

The Law of Inheritance—Heirs at Law—Rights of Surviving Spouse—Dowry Rights.

I. Of transmission of rights by death of the person in whom they were vested. (a) Of Succession. (b) Of the Acceptance and Repudiation of the inheritance. (c) Of acceptance with the benefit of inventory. (d) Of the rights and obligations of the heir. (e) Of the separation of estates of the deceased and of the heirs. (f) Of the division of the inheritance. (g) Of vacant successions. (h) Of intestate successions. (i) Of the order in intestate successions. (j) Of the legal portion of heir by necessity (Sohm's wording), or heir at law.

FIFTEENTH LECTURE.

Wills—Modes of Execution—Probate.

I. Of the testamentary succession. (a) Of the capacity to make a will. (b) Of the forms of Testaments. 1. Holographic. 2. By Public Deed. 3. Sealed or Closed. 4. Of Special Testaments. 5. Of Codicils. 6. Of the opening, publication, probate and protocolization of wills. (c) Of Witnesses to Wills. (d) Of the institution and substitution of heirs. (e) Of the capacity to acquire by Testament. (f) Of disinheritance. (g) Of legacies. (h) Of the lapsing of legacies. (i) Of the right of accretion. (j) Of the revocation of Testaments and legacies. (k) Of Executors.

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